UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

APPLE SOCAL, LLC d/b/a APPLEBEE'S, APPLE AMERICAN GROUP, II, LLC d/b/a APPLEBEE'S and APPLE AMERICAN GROUP, LLC	)	**CASE NO.: 31-CA-185387**
and	)	
SAMUEL Y. RODRIGUEZ, an Individual	)	

RESPONDENTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT; SUPPLEMENTAL DECLARATION OF NATALJA FULTON; DECLARATION OF ROBERT D. VOGEL; AND EXHIBITS IN SUPPORT THEREOF

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I. INTRODUCTORY STATEMENT

In its opposition to Respondents' motion seeking partial summary judgment in this case as to the first amended and later amended charges[1], counsel for the general counsel improperly requests the Board grant it summary judgment on the merits of the charges. That request violates both the Board's own rules and regulations and its recent decision rendered in *Boeing Co.*, 365 NLRB No. 154 (2017) ("Boeing"). A majority of the general counsel's opposition to the motion addresses that improper request.

In response to the motion itself, the general counsel "agrees that there is no genuine issue of material fact" as to Respondents' claim the amended charges are untimely consistent with Section 10(b) of the Act. [Opp. at 1]; Respondents **neither adopted or maintained** their 2011 arbitration agreement within the six (6) months prior to the filing of any charge in this case; Respondents only sought to **enforce** the agreement against the charging party in court within six (6) months of the filing of the initial September 29, 2016 charge; the initial charge is not currently the subject of a hearing; the January 17, 2017 first amended and all later charges, which are the subject of a current hearing, were filed more than six (6) months after Respondents successfully enforced the agreement against charging party in court; and the first amended and later amended charges are only timely if they are determined to be closely related to the initial charge consistent with *Redd-I, Inc.*, 290 NLRB No. 140 (1988) ("Redd-I") and the Board continues to follow *Redd-I* in light of later relevant United States Supreme Court decisions.

[1] The general counsel questions why Respondents did not specifically reference in their motion the second and third amended charges filed in this case on March 30 and April 26, 2017 which are attached to the supplemental declaration of Natalia Fulton filed herewith as Exhibits "2" and "3" thereto. Respondents did not do so because those charges merely added the names of additional respondents and the factual and legal basis for those charges are identical to those first set forth in the first amended charge.

II. THE UNTIMELY FILED AMENDED CHARGES ARE NOT CLOSELY RELATED TO THE TIMELY FILED INITIAL CHARGE CONSISTENT WITH REDD-I AND ASSUMING, ARGUENDO, THEY ARE, THE REDD-I TEST CONFLICTS WITH LATER RELEVANT UNITED STATES SUPREME COURT DECISIONS

In its opposition, the general counsel misstates the separate and distinct factual and legal basis for the untimely filed amended charges that are the subject of the motion. They do not, as general counsel erroneously represents, complain Respondents violated the Act because they "maintained and enforced the mandatory arbitration agreement that precluded employees from engaging in class or collective action . . . ." [Opp. at 2] That, significantly, is the factual and legal basis for only the first timely filed initial charge.

The factual and legal basis for the later untimely filed amended charges are that the 2011 arbitration agreement "is broad, confusing, and unclear, so that employees would reasonably interpret it to mean that they are precluded from filing unfair labor practice charges with the Board." [Opp. at 14] The general counsel misrepresents the contents of the second and third amended charges as well in his attempt to persuade the Board they are closely related to the initial charge and should be declared timely as a result consistent with *Redd-I.*

In arguing the untimely amended charges directly relate to the timely initial charge, the general counsel states "the question is whether they **maintained** the [2011] Agreement within the six month period preceding the filing of the charge." [emphasis added] [Opp. at 8] Although it is true Respondents **enforced** the 2011 arbitration agreement within the six (6) months preceding the filing of the initial charge, there is no evidence Respondents "maintained" or "enforced" language in the same agreement "employees would reasonably interpret. . . . to mean that they are precluded from filing unfair labor practice charges with the Board." [Opp. at 14] That is the question that must be answered for purposes of the merits of the amended charges that are presently the only subject of a hearing.

In that regard, it is telling the only evidence the general counsel relies upon in support of its contention the amended charges were timely filed pertain solely to the undisputed fact Respondents sought to enforce the 2011 arbitration agreement in 2015 -2016 in court against the charging party. Respondents concede that evidence and argument are related to the first charge but dispute they are factually and legally "closely related" to the later untimely amended charges.

In order to be deemed timely, the general counsel ultimately concedes it bears the burden of meeting the *Redd-I* test and quotes *Redd-I* that the timely and untimely charges must " 'all involve the same theory . . . [and] arise from the same factual situation . . . This means that the allegations must involve similar conduct usually during the same time period with a similar object. . . . Finally, we may look at whether Respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise timely allegations as it would in defending against the allegations in the untimely pending charge.' " [Opp. at 9-10]

In this case, the timely and untimely charges **clearly do not involve the same legal theory.** Respondents have not raised the same or similar defenses to both allegations and would not have preserved similar defense evidence and/or prepared a similar defense against the untimely allegations as they are in defending against the allegations in the timely charge.

The admitted fact both charges concern the contents of 2011 arbitration agreement does not change this result. Although the general counsel claims the same exact language in the arbitration agreement are at issue in both charges, that is not true. The initial charge does not deal with Respondents allegedly maintaining an agreement that prohibits collective or class actions because as the general counsel concedes, Respondents later materially revised the agreement prior to the filing of any charge in this case. The initial charge deals solely with the

enforcement of the 2011 arbitration agreement against the charging party in court in 2015-2016. Contrastly, the relevant agreement language discussed on page 14 of the opposition and hereafter has nothing whatsoever to do with Respondents' enforcement of the agreement against charging party in court.

And although the general counsel cites cases for the proposition "maintaining" an unlawful rule is a continuing violation of the Act, that misses the mark because the general counsel concedes Respondents no longer "maintained" the 2011 agreement after 2013. [Fulton Decl., ¶¶ 17-18.] The only conduct Respondents engaged in which is the subject of any charge in this case is they sought to "enforce" the 2011 agreement in court in 2015-2016 against the charging party. [Fulton Declaration, ¶¶s 19-22]

Although it is understandable, under the circumstances, why the general counsel would erroneously state Respondents both "maintained and enforced" the 2011 agreement on an ongoing timely basis, the proof is in the pudding: Respondents ceased to "maintain" the agreement in 2013 and only "enforced" the class action prohibition components of it thereafter.

Moreover, general counsel's contention an examination of the *Redd-I* factors result in the untimely filed amended charges relating back to the timely filed initial charge is misplaced.

Redd-I proclaimed an ambiguous three (3) part test should be used to determine if a charge filed outside the six (6) month limitations is timely filed because of an earlier timely filed charge. The test is (1) whether the amended charge is legally related to the allegations in the timely charge; (2) whether it is factually related to the allegations in the timely charge; and (3) whether the respondent is likely to use the same legal defenses in response to the amended allegations as it would against the original allegations in the initial timely filed charge.

The amended charge, to be considered timely, must satisfy at least prongs one (1) and two (2) and the Board may consider the third prong as well. 290 NLRB at 1119. Clearly, the

third prong has not been met in this case. The general counsel implicitly concedes Respondents' legal defenses to the first charge dealing solely with allegations and legal contentions currently pending Supreme Court review and decision in *National Labor Relations Board v. Murphy Oil* are not the same legal defenses they will be asserting and relying upon in response to the amended charges and allegations that address prior Board decisions rendered in *U-Haul Co. of California*, 347 NLRB 375 (2006) and *Boeing*.

The first prong of *Redd-I* has also not been met in this case. Although, admittedly, both the initial and amended charges rely upon Section 8(a)(1) of the Act, **they do not "involve the same legal theory."** *Redd-I, supra,* at 1119. If they did, Region 31 would not have issued an order withdrawing those portions of the complaint that dealt solely with the allegations in the initial charge, placing them in abeyance and going forward to hearing on only those allegations set forth in the amended charges. [See Exhibit "5" to Fulton's initial decl.]. The fact Region 31 decided to separate and segregate for purposes of hearing the allegations in the amended charges from the separate and distinct allegations in the initial charge constitutes an implicit admission the allegations in both charges do not "involve the same legal theory" and, if they do not, the amended charges are untimely consistent with *Redd-I* because they do not meet the first prong of the *Redd-I* test. Thus, the amended charges are not "closely related" to the initial charge for purposes of Section 10(b) and were untimely filed.

But even assuming, arguendo, that is not the case, the Board should seize the opportunity in this case and re-examine the "closely related" *Redd-I* standard in light of related United States Supreme Court precedent decided since the Board issued that decision almost 30 years ago.

In 2002 and 2007, the Supreme Court addressed the statute of limitations in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A.§2000e-5(e)(1) ("[A] charge under this section shall be filed within 180 days after the alleged unlawful employment practice occurred")

Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) and *Nat'l. R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 104-05 (2002).

In both these cases, the Supreme Court held allegations in an EEOC charge should be dismissed as falling outside the required statutory filing period even if other alleged violations by the same charging party fell within the statutory period. *Ledbetter,* 550 U.S. at 623, and *Morgan,* 536 U.S. at 112.

Although, admittedly, the statutory time period for filing administrative charges before the EEOC and NLRB are different, the statutory language is substantially similar, both statutes commence computing the time period to file a timely charge from the time the alleged unlawful "practice" occurs and both Title VII and the National Labor Relations Act provide similar regulatory schemes and structure for addressing unlawful labor practice claims.

Accordingly, the Supreme Court's interpretation of the Title VII statutory filing period provision for purposes of addressing whether untimely EEOC administrative charges should be deemed timely is persuasive in cases such as this one and the Board's prior *Redd-I* test as to this issue is inconsistent with the Supreme Court's later interpretation of an analogous labor statute's filing period provisions in *Ledbetter* and *Morgan.*

Redd-I's factual and legal relatedness test in determining whether untimely allegations relate back to timely filed charges ignores the Supreme Court's later reasoning and holdings in both *Ledbetter* and *Morgan.* In fact, in *Morgan,* the later untimely allegation, unlike in this case, involved the "same legal theory" as the earlier timely allegations. Even though the same section of Title VII was allegedly violated, the court dismissed the untimely allegation without addressing the legal relatedness of the allegation to the timely allegations which *Redd-I* counsels should take place. *Morgan, supra*, 536 U.S. at 104-05.

The second prong of the *Redd-I* test – factual relatedness between the timely initial and untimely amended charge – also does not pass muster under *Ledbetter* and *Morgan.* The Supreme Court in those cases declared that whether the untimely allegations are properly encompassed in the timely administrative charge depends upon whether the untimely allegations constitute a separate and discrete statutory violation, like what the Board alleges in the amended charges in this case, or, instead, a "single wrong" perpetrated through a series or successive acts, each of which "may not be actionable on its own." Id. at 115. The Supreme Court in *Morgan* declared that if some of the acts occurred within the limitations period, the whole succession of acts, even if some of them occurred outside the limitations period, were timely. Id. at 117. But importantly, "when an employee alleges serial violations, i.e. a series of actionable wrong," [such as the Board does in this case in the initial and amended charges], "a timely EEOC charge must be filed with respect to each discrete alleged violation." *Ledbetter, supra,* 550 U.S. at 636.

Ledbetter also analyzed "discrete practices" for purposes of determining the timeliness of EEOC charges. *Id.* at 626. A "discrete practice" claim that is untimely filed can only avoid dismissal on limitation grounds **if it alleges a specific act which occurred within the statutory period.** *Id.* at 622-23. "Discrete practice" refers to a single occurrence at a single point in time which is "independently identifiable and actionable." Id. at 631. The plaintiff in *Ledbetter* alleged that during the timely statutory filing period, her employer paid her lower wages because of several alleged discriminatory evaluations she received prior thereto that were time-barred. Id. at 621-22. The Supreme Court held that the continuing effects of an untimely allegedly discriminatory act (job evaluation) did not revive the chargeability of the original discriminatory act. Id. at 632.

Similarly, in this case, the Board contends the untimely "maintenance" of the 2011 arbitration agreement had an allegedly unlawful continuing effect on the charging party, almost

four (4) years after his employment ended on March 24, 2013, within six (6) months of him filing his first amended charge on January 17, 2017 when he alleged for the first time Respondents' maintenance of the 2011 arbitration agreement would result in employees reasonably interpreting it to prohibit their access to the Board.

In *Ledbetter,* the Supreme Court dismissed the claim because the pay checks later received were merely the effects of the original alleged discriminatory acts, the job evaluations, which occurred outside of the filing period. Consistent therewith, the Supreme Court later in *Morgan* held "discrete acts that fall within the statutory time period do not make timely acts that fall outside the time period" and, as a result, "only those acts that occur [within the statutory time period] are actionable." 536 U.S. at 106, 112 and 114.

Similarly, in this case, the arguable unknown "discrete act" the general counsel relies upon in support of the amended charges occurred at some unknown and undisclosed time between July 30, 2011, when the charging party signed the 2011 arbitration agreement, and March 25, 2013, when his employment ended with Respondents. [Fulton Decl., ¶¶ 12-15] Clearly, the maintenance of the 2011 arbitration agreement as to charging party expired well prior to six (6) months before the January 23, 2017 filing of the initial amended charge.

And although charging party's legal counsel, who filed the initial and first amended charges on his behalf, stated in a pleading filed on behalf of the charging party at the same time in a related arbitration proceeding the 2011 arbitration agreement explicitly permitted charging party and similarly situated employees to engage in concerted activities under the Act [Fulton Supp. Decl., ¶ 9 and Exhibit "4" thereto], the general counsel, in contending no triable issue of material fact exists as to Respondents' motion, has presented no evidence in opposition other than its opinion the arbitration agreement charging party signed in 2011 precluded or restricted

him in filing unfair labor practice charges with the Board as alleged in paragraph 10 of the complaint. [Fulton Decl., ¶ 12].

In the absence of any evidence presented the charging party, within six (6) months of the January 1, 2017 first amended charge, objectively and reasonably believed, contrary to his attorney's declaration against interest made at same time, the arbitration agreement he signed in 2011 precluded or restricted him from filing an unfair labor practice charge with the Board, a timely "specific act" did not take place and, consistent with *Ledbetter* and *Morgan*, the allegations in the amended charges are untimely and Respondents' motion should be granted because the allegation Respondents maintained and enforced the 2011 agreement against charging party in court are "independently identifiable and actionable" allegations.

III. IN OPPOSING RESPONDENTS' PARTIAL SUMMARY JUDGMENT MOTION BROUGHT SOLELY ON PROCEDURAL GROUNDS, THE GENERAL COUNSEL IMPROPERLY REQUESTS THE BOARD GRANT IT SUMMARY JUDGMENT ON THE MERITS OF THE AMENDED CHARGES

Even though it had ample opportunity to do so, at no time has the general counsel sought summary judgment in this case consistent with Rule 102.24(a) of the Board's Rules and Regulations.

Instead, in flagrant violation of the Board's rules, the general counsel spends a significant portion of its opposition to Respondents' partial summary judgment motion brought **solely** on procedural timeliness grounds consistent with Section 10(b) of the Act improperly requesting the Board conclude Respondents violated the Act on the merits. [Opp. at 1 and 12-18] The general counsel's attempt to deliberately circumvent the Board's explicit rules and regulations in this regard should be summarily rejected.

Additionally, the general counsel's request for summary judgment in its favor on the merits of the amended charges should be summarily rejected because it flies in the face of

Respondents' entitlement to present evidence at a hearing in defense to the merits of the charges consistent with *Boeing.*

In *Boeing,* in determining whether employment policies and/or handbook provisions like the arbitration agreement involved in this case violate the Act, the Board declared one should focus upon and evaluate whether the agreement's "potential adverse impact on protected rights is outweighed by [business] justification associated with" the agreement and determine whether "the adverse impact on NLRA rights [by maintaining and/or enforcing the Agreement] is not outweighed by justifications associated with the rule." *Boeing* at pp. 3-4.

In seeking partial summary judgment on the merits of the amended charges, the general counsel is inappropriately seeking to preclude Respondents from submitting such evidence at a hearing consistent with the specific holding in *Boeing.*

Boeing mandates Respondents are entitled to present evidence in response to the amended charges that address (1) "the nature and extent of the potential impact on NLRA rights [by maintaining and/or enforcing the arbitration agreement] and (ii) [Respondents'] legitimate justifications associated with the [arbitration agreement's] requirement(s)." Id. at 14. "In all cases, the Board will consider whether a facially neutral rule, when reasonably interpreted, has a potential adverse effect on the exercise of NLRA-protected rights. If so, **the Board will then consider the justifications associated with the challenged rule to determine whether maintenance of the rule violates the Act."** [emphasis added] Id. at 20.

Again, relying solely upon the contents of the agreement itself, the general counsel's procedurally improper request for partial summary judgment on the merits seeks to effectively preclude Respondents from introducing such evidence for the administrative law judge's consideration directly contrary to *Boeing.*

And even if the arbitration agreement "may reasonably chill" the exercise of Section 7 rights, it may "still be justified by significant employer interests", Id. at 7 n. 30, which Respondents are entitled to factually address at a hearing.

Boeing mandates Respondents' "justification" for the components of the 2011 agreement that are now at issue must be considered and evaluated in determining whether the alleged maintenance and/or enforcement of the agreement violates the Act as a category 1(ii) and/or 3 rule.

Directly contrary to charging party's legal counsel's declaration against interest filed in a related arbitration proceeding at the same time it filed the first amended charge on his behalf in this case, the Board has presented no evidence, other than the language in the 2011 agreement itself, the charging party ever arguably "reasonably construed" the Agreement "to prohibit some type of potential Section 7 activity that might (or might not) occur in the future" within six (6) months of filing the amended charge. *Id.* at 2

In reality, the general counsel's inappropriate request for partial summary judgment on the merits is based solely upon the holding in *Lutheran Heritage Village - Livonia,* 343 NLRB 646 (2014), an agreement like the one involved in this case is unlawful "**solely** because they were ambiguous in some respect." [Board's emphasis] *Boeing* rejected *Lutheran Heritage's* holding in that regard in stating agreements are not unlawful "**solely** because they were ambiguous in some respect **without taking into account any legitimate justifications associated with policies, rules and handbook provisions.**" Id. at 2. [Board's emphasis]

And if the legality of the 2011 agreement is not to be materially measured by charging party's contrary advanced position at the time the untimely amended charge was filed, the totality of the relevant language in the 2011 arbitration agreement explicitly and unambiguously states the charging party and similarly situated individuals do possess the right to engage in

concerted activities under the Act including, but not limited to, filing unfair labor practice charges [2].

As a result, if its partial summary judgment motion on procedural grounds is denied, *Boeing* holds Respondents have the right to introduce evidence, including charging party's declaration against interest, addressing whether the 2011 arbitration agreement is ambiguous when "balancing rights and interests or justifications" associated with the agreement and evaluating and determining whether the agreement is central or peripheral to protected activities within the meaning of the Act because *Boeing* proclaims "the Board must carefully evaluate the nature and extent of the Rule's adverse impact on NLRA rights, [in] addition to potential justifications [for the agreement] and [whether] the Rule's maintenance will violate Section 8(a)(1) if the Board determines that the justifications are outweighed by the adverse impact on rights protected by Section 7." Id. at 16. *Boeing* emphatically states "the Board has the duty to strike the balance between employees' rights and employers' business justifications in determining the legality of the employment policies, rules and handbooks at issue." Id. at 3 n. 14.

General counsel's procedurally and substantively improper request for partial summary judgment on the merits of the amended charges would prohibit Respondents from introducing evidence at a hearing to assist the administrative law judge in making those determinations.

In erroneously contending Respondents "maintained" the 2011 arbitration agreement during the applicable 10(b) period and, during that time, violated the Act because the charging party reasonably read it to prohibit him from filing unfair labor practice charges with the Board consistent with the recently adopted *Boeing* standard, the general counsel fails to fully quote the explicit language in the agreement that charging party's legal counsel, at the same time he filed the amended charge on his behalf, opined in related arbitration proceedings the 2011 agreement

[2] General counsel's reliance upon Respondents' later decision to discontinue and revise the 2011 agreement as alleged evidence the prior agreement was unlawfully ambiguous is inadmissible in this case consistent with Federal Rule of Evidence 407 that precludes the admissibility of subsequent remedial measures.

"[E]xplicitly Permit Concerted Activities Under The National Labor Relations Act." In making that declaration against interest, charging party's legal counsel relied on the same "explicit" language Respondents also rely upon in the agreement: **"I also understand that I have not waived my rights under the National Labor Relations Act to join other employees in a collective action to improve working conditions. Further, I will not be subject to adverse employment action if I challenge the validity of this arbitration agreement or its provisions."** [emphasis added] [Fulton Decl., Exhibit "8," first page, paragraph 4]

Despite this clear language and charging party's declaration against interest consistent therewith, the general counsel boldly states it is entitled to summary judgment on the merits of the charge because the agreement does not mention "the right to file an unfair labor practice charge with the Board" and "makes no mention of the National Labor Relations Act . . . ." [Opp. at 15] On the contrary, as quoted above, the 2011 agreement states the charging party has "not waived my rights under the National Labor Relations Act" and "will not be subject to [an] adverse employment action if [he] challenge[s] the validity of this Arbitration Agreement or its provisions."

The general counsel further speculates "an objectively reasonable employee would interpret the Agreement to prohibit them from acting collectively to file unfair labor practice charges", *Id.*, despite the explicit language quoted above that by signing and agreeing to the 2011 arbitration agreement, the charging party was clearly and expressly told he has not waived any rights under the Act "to join other employees in a collective action" nor "be subject to [a]n adverse employment action" if he later challenged the validity of its arbitration provisions.

And the fact Respondents later adopted, maintained and enforced the 2014 arbitration agreement, which was in effect at all times all charges were filed and is not the subject of this case, does not mean, as general counsel suggests, the prior 2011 Agreement violated the Act,

since the case it relies upon for this proposition is currently stayed by the second circuit court of appeal and did not raise or involve a *U-Haul Co.* rule violation allegation. [Fulton Decl., ¶¶ 17-18 and Exhibits "9" and "10" thereto.]

Thus, general counsel's conjecture, in an attempt to meet the requirements of *Boeing,* "it is difficult to conceive Respondents' justification" and/or "any purported justification . . . is peripherally at best" for the alleged maintenance of the 2011 arbitration agreement [Opp. at 17] is woefully insufficient to deprive Respondents of their entitlement to submit relevant evidence to an administrative law judge in a hearing addressing the merits of the charge if it is concluded the amended charges were timely filed.

IV. CONCLUSION

Based upon the foregoing and its moving papers, Respondents respectfully request the Board grant its Motion for Partial Summary Judgment because the amended charges were untimely filed in this case.

Alternatively, Respondents request the Board summarily deny the general counsel's request it be granted partial summary judgment on the merits of those charges.

Respectfully submitted,

Dated: May 16, 2018

JACKSON LEWIS P.C.

By: _____
Robert D. Vogel

Attorneys for APPLE AMERICAN GROUP II, LLC d/b/a APPLEBEE'S AND APPLE AMERICAN GROUP, LLC

SUPPLEMENTAL DECLARATION

SUPPLEMENTAL DECLARATION OF NATALJA FULTON

I, NATALJA M. FULTON, declare and state as follows:

1. This declaration is supplemental to the one I executed on May 1, 2018 filed in support of Respondents' Motion for Partial Summary Judgment in this case.

2. On January 23, 2017, after the initial and amended unfair labor practice charges were filed in this case, I received a July 23, 2017 letter from Angelica Blanco, Board Agent for Region 31 of the National Labor Relations Board, requesting evidence and other information in response to the initial and amended charges. A true and complete copy of this letter is attached hereto as Exhibit "1".

3. In the letter, Ms. Blanco stated Charging Party Samuel Y. Rodriguez' initial unfair labor practice charge (attached as Exhibit "1" to my initial Declaration) dealt with the allegation Respondents had violated the Act by maintaining and enforcing a mandatory arbitration agreement contained in Respondents' 2011 version of their Dispute Resolution Program Booklet and Receipt of Dispute Resolution Program and Agreement to Abide by Dispute Resolution Program and Agreement attached as Exhibits "7" and "8" to my initial declaration.

4. Region 31's January 23, 2017 letter also requested evidence and information concerning the January 17, 2017 first amended charge filed in this case. Specifically, as to that charge, Region 31 claimed Respondents violated the Act in that the 2011 arbitration agreement, according to the Charging Party, "is broad and confusing so that employees would reasonably conclude that they are precluded from filing unfair labor practice charges with the NLRB" consistent with *U Haul Co. of California,* 347 NLRB 375, 377-78 (2006).

5. True and complete copies of the second and third amended charges later filed in this case are attached hereto as Exhibits "2" and "3" respectively.

6. On July 26, 2017, consistent with paragraphs 5 and 7-8 of my initial declaration and Exhibits "5" and "7" attached thereto, approximately a month after the complaint in this case issued, Region 31 filed an Order withdrawing portions of the complaint and placing them in abeyance. The Order only pertained to the allegations contained in the initial unfair labor practice charge filed in this case that the 2011 arbitration agreement "prohibits class or collective legal claims in all forums, arbitral and judicial, and have required employees, as a condition of employment, to sign the Agreement to be bound to the terms of the Booklet ... [and Respondents] ... **have enforced** the Agreement by asserting it in litigation [against the Charging Party,] . . .". [emphasis added] [See page one of Exhibit "5" to my initial declaration].

7. Both the initial September 9, 2016 and first amended January 23, 2017 charges in this case were filed by Charging Party's legal counsel on his behalf who also represented him in the litigation referenced in paragraphs 20-21 of my initial declaration in which the court granted Respondents' Petition to Compel Individual Arbitration and Stay Judicial Proceedings Against Charging Party consistent with the 2011 Arbitration Agreement Charging Party signed when he commenced his employment.

8. On January 13, 2017, four (4) days prior to them filing the amended charge on behalf of the Charging Party in this case, Charging Party's legal counsel in the above-mentioned related litigation filed a brief on behalf of Charging Party with an arbitrator in support of the contention class wide arbitration should be ordered by the arbitrator in the arbitration proceeding.

9. On page 6-7 of that brief, Charging Party's legal counsel advocated before the arbitrator the 2011 Arbitration Agreement, consistent with Respondents' position in this case,

"[E]xplicitly Permit Concerted Activities Under The National Labor Relations Act." A true and complete copy of Charging Party's brief is attached hereto as Exhibit "4".

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct.

Executed this 15th day of May, 2018 at San Francisco, California.

NATALJA M. FULTON

4828-4442-1734, v. 1

EXHIBIT 1

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 31
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January 23, 2017

Via E-Mail

Natalja Fulton, Esq.
Apple American Group LLC
225 Bush St Ste 1800
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nfulton@appleamerican.com

Re: Apple American Group II, LLC d/b/a Applebee's and Apple American Group, LLC
Case 31-CA-185387

Dear Ms. Fulton:

The Charging Party, Samuel Y. Rodriguez ("Rodriguez"), recently amended the above referenced charge. This letter serves to advise you that it is now necessary for me to take evidence from Apple American Group II, LLC d/b/a Applebee's and Apple American Group, LLC (collectively "Apple American Group") regarding the allegations raised by Rodriguez in the amended charge and to afford you an opportunity to fully cooperate with the Region in its investigation. "Full cooperation" includes 1) making individuals available to me so that I can take sworn affidavits; 2) presenting copies of documentation pertinent to the allegations; 3) providing a detailed position statement, including citations to relevant Board law; and 4) providing anything additional that you believe will assist the Region in making a decision on the charge.

Set forth below are the allegations and issues on which your evidence is needed, a request to take affidavits, a request for documentary evidence, and the date for providing your evidence.

Allegations: The allegations for which I am seeking your evidence are as follows.

Rodriguez alleges that Apple American Group violated Section 8(a)(1) of the National Labor Relations Act ("the Act") by maintaining and enforcing a mandatory arbitration agreement that limits employees' Section 7 rights, in violation of the Board's decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) and *Murphy Oil*, 361 NLRB No. 72 (Oct. 28, 2014). For example, the Receipt of Dispute Resolution Program and Agreement to Abide by Dispute Resolution Program ("Receipt") states the following:

> **MUTUAL PROMISE TO RESOLVE CLAIMS BY BINDING ARBITRATION.** In signing this Agreement, both the Company and I agree that

all legal claims or disputes covered by the Agreement must be submitted to binding arbitration and that this binding arbitration will be the sole and exclusive final remedy for solving any such claim or dispute. We also agree that any arbitration between the Company and me will be on an individual basis and not as a class or collective action. (Emphasis in original).

Further, the Dispute Resolution Program ("DRP") states the following:

THIS PROGRAM IS A CONDITION OF YOUR EMPLOYMENT AND IS THE MANDATORY AND EXCLUSIVE MEANS BY WHICH DISPUTES BETWEEN YOU AND THE COMPANY MAY BE RESOLVED, SO READ THE INFORMATION IN THIS PROGRAM CAREFULLY.

...

The parties also agree that any arbitration between the employee and the Company is of their Individual claim and that any claim subject to arbitration will not be arbitrated on a collective or class-wide basis. (Emphasis in original).

Rodriguez amended the charge to also allege that Apple American Group violated Section 8(a)(1) of the Act in that the arbitration agreement would be interpreted by employees to prohibit access to the National Labor Relations Board ("NLRB"). *U-Haul Co. of California*, 347 NLRB 375, 377-78 (2006). Specifically, Rodriguez contends that the Receipt and the DRP contain language that is broad and confusing so that employees would reasonably conclude that they are precluded from filing unfair labor practice charges with the NLRB. For example, the Receipt states, "I also understand that I have not waived my rights under the National Labor Relations Act to join other employees in a collective action to improve working conditions." However, the Receipt also states the following:

This is an agreement to arbitrate all legal claims. Those claims include: claims for wages or other compensations; ... claims for wrongful termination; ... claims for benefits ... ; claims for a violation of any other civil federal, state or other government law, statute, regulation or ordinance; and claims for retaliation under any law, statute, regulation or ordinance, including retaliation under any workers compensation law, regulation, except as required by law.

...

I understand and agree that "the only claims or disputes not subject to arbitration are as follows: (1) any claim by an employee for benefits under a plan or program which provides its own binding arbitration procedure; (2) any statutory workers compensation claim; and (3) unemployment claims."

...

> **I understand that by entering into this Agreement, I am giving up my right to have my legal claims against the Company decided in court by a judge or jury.**
> ...
>
> I agree that the arbitrator, and not any federal, state or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, arbitrability, applicability, enforceability or formation of this Agreement, including, but not limited to, any claim that all or any part of this Agreement is void or voidable. (Emphasis in original).

Board Affidavits: I am requesting to take affidavits from any individuals you believe have information relevant to the investigation of this matter. Please be advised that if you do not allow the Board agent to take sworn affidavits from representatives who may have relevant information, the Agency will consider that to constitute less than complete cooperation in the investigation of the charge.

Position Statement and Documentary Evidence: In addition to the Board affidavits as set forth above, I am requesting that you submit a statement of position addressing Rodriguez' allegations that Apple American Group violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement that limits employees' Section 7 rights and would also be interpreted by employees to prohibit the filing of unfair labor practice charges with the NLRB. Please also state your legal theory, citing relevant Board law if applicable, regarding whether the above allegations constitute violations of Section 8(a)(1) of the Act.

Additionally, please provide the following documents, along with any and all other evidence you deem to be relevant to the case:

1. Copies of all arbitration policies/agreements maintained by Apple American Group since July 2011 to the present.

2. Copies of all documents related to the above-requested arbitration policies, including by not limited to: opt-in or opt-out forms, employee handbooks, supplemental forms, receipts, acknowledgements, and information brochures or handouts.

3. Copies of all documents signed by or provided to Charging Party Rodriguez during his employment, which related to the arbitration policy.

4. Copies of any other relevant, unprivileged documents relating to Charging Party Rodriguez' litigation and/or arbitration of his wage and hour claims.

5. In your position statement, please also address the relationship between the entities Apple American Group II, LLC *and* Apple American Group, LLC. What is the

relationship between the two entities?

6. In your position statement, please clarify which entity employed Rodriguez at the Asuza facility and which entity employed him at the Rancho Cucamonga facility.

Date for Submitting Evidence: To resolve this matter as expeditiously as possible, you must provide your evidence and position in this matter **by the close of business on January 30, 2017**. If you are willing to allow me to take affidavits, please contact me by **January 25, 2017** to schedule a time to take affidavits. Electronic filing of position statements and documentary evidence through the Agency website is preferred but not required. To file electronically, go to **www.nlrb.gov,** select **E-File Documents,** enter the **NLRB case number,** and follow the detailed instructions. If I have not received all your evidence by the due date or spoken with you and agreed to another date, it will be necessary for me to make my recommendations based upon the information available to me at that time.

Please contact me at your earliest convenience by telephone, (310)307-7326, or e-mail, angelica.blanco@nlrb.gov, so that we can discuss how you would like to provide evidence and I can answer any questions you have with regard to the issues in this matter.

Sincerely,

/s/ Angelica Blanco

Angelica Blanco
Board Agent

EXHIBIT 2

Form NLRB - 501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

SECOND AMENDED CHARGE AGAINST EMPLOYER

INSTRUCTIONS:

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
31-CA-185387	3/30/17

File an original of this charge with NLRB Regional Director in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer	b. Tel. No.
Apple Mid Cal II, LLC d/b/a Applebee's Apple American Group II, LLC d/b/a Applebee's Apple American Group, LLC	c. Cell No. (415)835-0226
d. Address (street, city, state ZIP code) See Attachment	e. Employer Representative Melissa Griffin
	f. Fax No.
	g. e-Mail
	h. Dispute Location (City and State) Azusa, CA
i. Type of Establishment (factory, nursing home, hotel) Restaurant	j. Principal Product or Service Bar & Grill Restaurant
	k. Number of workers at dispute location 200

l. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (*set forth a clear and concise statement of the facts constituting the alleged unfair labor practices*)

Within the past six months, the Employer maintained and enforced an arbitration agreement that precludes employees from collective action in all forums, arbitral and judicial, that employees would interpret to prohibit access to the Board.

3. Full name of party filing charge (*if labor organization, give full name, including local name and number*)
Samuel Y. Rodriguez

4a. Address (street and number, city, state, and ZIP code)	4b. Tel. No.
c/o Matern Law Group, 1230 Rosecrans Ave, Suite 200, Manhattan Beach, CA 90266-2497	(310)531-1900
	4c. Cell No.
	4d. Fax No. (310)531-1901
	4e. e-Mail mmatern@maternlawgroup.com

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (*to be filled in when charge is filed by a labor organization*)

6. DECLARATION **I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.**	Tel. No. (310)531-1900
By: [signature] Attorney (signature of representative or person making charge) Tagore Subramaniam Print Name and Title	Office, if any, Cell No.
	Fax No. (310)531-1901
Address: Matern Law Group, 1230 Rosecrans Ave, Suite 200, Manhattan Beach, CA 90266-2497 Date:	e-Mail mmatern@maternlawgroup.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Attachment

d. Address

Apple Mid Cal II, LLC d/b/a Applebee's
10709 E. Foothill Blvd.
Rancho Cucamonga, CA 91730

Apple Mid Cal II, LLC d/b/a Applebee's
377 N. Citrus Ave.
Azusa, CA 91702

Apple American Group II, LLC d/b/a Applebee's
6200 Oak Tree Blvd., Ste 1800
Independence, OH 44131

Apple American Group, LLC
6200 Oak Tree Blvd., Ste 1800
Independence, OH 44131

EXHIBIT 3

Form NLRB - 501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

THIRD AMENDED CHARGE AGAINST EMPLOYER

INSTRUCTIONS:

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
31-CA-185387	4/26/2017

File an original of this charge with NLRB Regional Director in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Apple SoCal, LLC d/b/a Applebee's
Apple American Group II, LLC d/b/a Applebee's
Apple American Group, LLC

b. Tel. No.

c. Cell No.
(415)835-0226

d. Address (street, city, state ZIP code)
See Attachment

e. Employer Representative
Melissa Griffin

f. Fax No.

g. e-Mail

h. Dispute Location (City and State)
Azusa, CA

i. Type of Establishment (factory, nursing home, hotel)
Restaurant

j. Principal Product or Service
Bar & Grill Restaurant

k. Number of workers at dispute location
200

l. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (*set forth a clear and concise statement of the facts constituting the alleged unfair labor practices*)

Within the past six months, the above-named Employers maintained and/or enforced an arbitration agreement that precludes employees from collective action in all forums, arbitral and judicial, that employees would interpret to prohibit access to the Board.

3. Full name of party filing charge (*if labor organization, give full name, including local name and number*)
Samuel Y. Rodriguez

4a. Address (street and number, city, state, and ZIP code)
c/o Matern Law Group
1230 Rosecrans Ave, Suite 200
Manhattan Beach, CA 90266-2497

4b. Tel. No.
(310)531-1900

4c. Cell No.

4d. Fax No.
(310)531-1901

4e. e-Mail
mmatern@maternlawgroup.com

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (*to be filled in when charge is filed by a labor organization*)

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

Tel. No.
(310)531-1900

By: _____
(signature of representative or person making charge)

Tagore O. Subramaniam, Attorney
Print Name and Title

Office, if any, Cell No.

Fax No.
(310)531-1901

Address: 1230 Rosecrans Ave, Suite 200
Manhattan Beach, CA 90266-2497

Date: April 26, 2017

e-Mail

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Attachment

d. Address

Apple SoCal, LLC d/b/a Applebee's
10709 E. Foothill Blvd.
Rancho Cucamonga, CA 91730

Apple SoCal, LLC d/b/a Applebee's
377 N. Citrus Ave.
Azusa, CA 91702

Apple Arnerican Group II, LLC d/b/a Applebee's
6200 Oak Tree Blvd., Ste 1800
Independence, OH 44131

Apple American Group, LLC
6200 Oak Tree Blvd., Ste 1800
Independence, OH 44131

EXHIBIT 4

MATERN LAW GROUP, PC
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mmatern@maternlawgroup.com
TAGORE O. SUBRAMANIAM, SBN 280126
tagore@maternlawgroup.com
1230 Rosecrans Avenue, Suite 200
Manhattan Beach, California 90266
Telephone: (310) 531-1900
Facsimile: (310) 531-1901

Attorneys for Claimant SAMUEL YSABEL RODRIGUEZ II, individually and on behalf of all those similarly situated

AAA-ARBITRATION

SAMUEL YSABEL RODRIGUEZ, an individual, and on behalf of others similarly situated,

Claimant,

vs.

APPLE AMERICAN GROUP II, LLC, a corporation; APPLE AMERICAN GROUP, LLC, a corporation; and DOES 1 through 50, inclusive,

Respondent.

Case No: 01-16-0003-7441

CLAIMANT'S BRIEF IN SUPPORT OF CLASS-WIDE ARBITRATION

Date: February 6, 2017
Time: 3:00 p.m.
Arbitrator: Eric M. Epstein

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Claimant filed this action as a wage and hour class action, in order to remedy Respondents' illegal policies and practices related to meal and rest breaks, regular and overtime payment, among other issues, and in order to seek compensation on behalf of himself and a group of similarly situated aggrieved employees. Respondents, however, maintain that the arbitration should be limited to Claimant's individual claims for wage and hour violations as the Claimant purportedly agreed to a class action waiver of the claims at issue. However, to proceed on an individual basis would ignore recent decisions from the Seventh Circuit and Ninth Circuit finding that such waivers violate the National Labor Relations Act ("NLRA"). Moreover, it would ignore the explicit terms of the arbitration agreement which permit class and collective actions under the NLRA.

Accordingly, Claimant respectfully requests that arbitration proceed on a class-wide basis.

II. FACTUAL AND PROCEDURAL HISTORY

Claimant Samuel Ysabel Rodriguez ("Claimant") retained the law firm of Matern Law Group as counsel in a suit brought on behalf of himself and similarly situated current and former employees of Apple American Group II, LLC, a corporation; and Apple American Group, LLC ("Respondents" herein) who worked as non-exempt employees at locations in California. (Declaration of Tagore Subramaniam filed concurrently hereto ["Subramaniam Decl."] ¶ 4)

As part of Claimant's application to work for Respondents, he signed many documents.

On September 28, 2015, Claimant filed a class action lawsuit in Los Angeles Superior Court on his behalf, asserting nine causes of action for Respondents' violations of California wage and hour laws. The class action complaint was filed on behalf of all current and former employees of the Respondents who were employed at any of Respondents' locations within the state of California. (Subramaniam Decl. ¶¶ 5-6).

On June 9, 2016, Respondents filed a Petition to Compel Individual Arbitration and Stay Judicial Proceedings, arguing that Claimant should be ordered to arbitrate his individual claims,

based on his signature on the Respondents' Receipt of Dispute Resolution Program and Agreement to Abide by Dispute Resolution Program ("Agreement"). (Subramaniam Decl. ¶ 7, Exh. A).

On July 7, 2016 Judge Lisa Hart Cole compelled Claimant's suit to arbitration, specifically holding that the issue of class wide arbitrability would be submitted to arbitration. (See Subramaniam Decl. ¶ 8, Exh. B ("Order")).

III. ARGUMENT

A. The Arbitration Can And Should Follow Precedent Set Forth By The Ninth Circuit And Seventh Circuit Court Of Appeals And Find That Class-Wide Adjudication Is A Protected Concerted Activity Under The National Labor Relations Act.

1. Class-Wide Adjudication is a Concerted Activity Protected by the National Labor Relations Act

In 1932 Congress passed the Norris-LaGuardia Act in an effort to prevent employers from enforcing contracts restricting an employee's ability to join labor unions and engage in other forms of concerted activity. Recognizing the limited ability for individual employees to exercise control over their working conditions, Congress felt it necessary to pass laws that would facilitate concerted activities on the part of employees. See 29 USC § 102. Expanding on this framework, Congress passed the National Labor Relations Act ("NLRA") in 1935 (notably subsequent to the Federal Arbitration Act). Section 7 of the NLRA guarantees employees the right to engage in concerted activities and Section 8(a)(3) of the NLRA makes it an unfair labor practice for employers to interfere with an employee's rights

Specifically, Section 7 states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 157 (emphasis added). Section 8(a) (1) states "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title". 29 U.S.C. § 158.

Recognizing the strong public policy in protecting concerted activities on the part of employees, the National Labor Relations Board (hereafter "NLRB") has repeatedly found that that where an employer attempted to restrict class wide arbitration, such a restriction interfered with Plaintiff's right to engage in concerted activities. *Murphy Oil USA, Inc.*, 367 N.L.R.B. No. 72 (2014); *Bristol Farms*, 363 N.L.R.B. No. 45 (2015); *Fuji Food Products*, 363 N.L.R.B. No. 118 (2016); *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184; *Viamontes v. Adriana's Insurance*, 364 N.L.R.B. No. 17 (2016).

2. Ninth Circuit and Seventh Circuit Precedent Support the Position that Denying Class Arbitration Violates the NLRA

On May 26, 2016, the Seventh Circuit in *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016) addressed this issue. After a lengthy and thorough opinion, the Court found that arbitration agreements requiring individual arbitration and not permitting "collective arbitration or collective action in any other forum . . . violate [] the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151, et seq., and [are] also unenforceable under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, et seq." *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151 (7th Cir. 2016).

On August 22, 2016, the Ninth Circuit in *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016) largely relying on the Seventh Circuit's interpretation in *Lewis* reached a similar conclusion. The *Morris* Court began its analysis with reviewing the National Labor Relations Board's treatment of similar contract terms. *Id.* at 981. Applying *Chevron* deference, the Court first looked to see whether Congress had directly spoken to the precise question at issue. *Id.* Having determined that the intent of Congress was clear, and consistent with the National Labor Relations Board's ("NLRB") interpretation, *(Id.),* the Ninth Circuit found that requiring employees to sign an agreement precluding them from bringing, in any forum, a concerted legal claim regarding wages, hours, and terms and conditions of employment, violated the NLRA. *Id.* at 879.

Specifically, the Court found that the language of Section 7 protected a range of concerted employee activity, including the right to seek to disprove working conditions through resort to administrative and judicial forums. *Id.* at *981-982.* The Court further found that the NLRA established the right of employees to pursue work related legal claims and to do so together, and that this falls within the wording of Section 7 that employees have the "right to engage in concerted activities." Additionally, the Court found that preventing the exercise of a Section 7 right falls within the meaning of "interference" as described in Section 8's enforcement provisions. *Id.* Relying on prior precedent, the Ninth Circuit concluded that individual dispute resolution requirements nullify the right to concerted activity established in Section 7. *Id.* at 983.

Moreover, the Ninth Circuit concluded that the Federal Arbitration Act ("FAA") did not dictate a contrary result. As the Court noted, when reviewing the interaction between two federal statutes, it is the duty of the courts absent a clearly expressed congressional intent to the contrary, to regard each statute as effective and interpret them in a consistent manner to the extent possible. *Id.* at 987. The NLRA does not require a ban on arbitration, but rather the opportunity to pursue concerted legal claims. *Id.* at 986. Moreover, because the right to engage in concerted legal claims under the NLRA is a substantive federal right, it falls within the FAA's savings clause. *Id.* at 987.

"When addressing the interactions of federal statutes, courts are not supposed to go out looking for trouble: they may not ['] pick and choose among congressional enactments. ['] [*Morton*, 417 U.S. 535, 551 (1974)]. Rather, they must employ a strong presumption that the statutes may both be given effect. See *id.* The savings clause of the FAA ensures that, at least on these facts, there is no irreconcilable conflict between the NLRA and the FAA." *Lewis*, 823 F.3d at 1158.

3. *The Arbitration Should Follow Precedent Set Forth by the Ninth and Seventh Circuit.*

Unlike state trial courts and federal district courts, where there is a conflict between state and federal court interpretations, the arbitrator is free to adopt the most persuasive precedent and

reasoning before it. As part of "the tradition that emphasizes the highly individualistic nature of arbitration," precedent is not treated identically in arbitration as in the courts. Theodore J. St. Antoine, *The Use and Abuse of Precedent in Labor and Employment Arbitration*, 52 U. of Louisville L.R., 431, 437 (2014); *see also, W.R. Grace & Co. v. Local Union* 759, *Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757 (1983) (concluding that a second arbitrator could interpret a collective bargaining agreement as authorizing him to determine that a prior award regarding seniority was not binding in his decision). However, employment and class action arbitration makes extensive use of precedent, particularly "where concerns about ad hoc decision-making are most acute, such as when consumers and employees seek to vindicate non-waivable statutory rights in so-called "mandatory" arbitration regimes." W.C. Mark Weidenmaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 Nor.Car. L.R., 1092, 1095 (2012). As the scope of the NLRA and applicable ability of the FAA are issues of federal statutory interpretation, federal judicial opinions, particularly those of this circuit, offer the most persuasive guidance.

4. The California Supreme Court's Decision in Iskanian v. CLS Transp. Los Angeles, LLC, 59 Cal.4th 348 (2014) is Not Controlling or Persuasive

There exists conflicting authority from the California Supreme Court's decision in *Iskanian v. CLS Transp. Los Angeles, LLC* , 59 Cal.4th 348 (2014). However, two factors weigh heavily in favor of the persuasiveness of the Seventh and Ninth Circuit's decisions. First, the issue being decided is one of federal law where the interpretation by the federal courts should prevail. In fact, the Ninth Circuit has called into doubt whether state courts should follow stare decisis even when only lower federal courts have addressed the issue. *Yniguez v. State of Ariz.*, 939 F.2d 727, 736 (9th Cir. 1991) ("Despite the authorities that take the view that the state courts are free to ignore decisions of the lower federal courts on federal questions, we have serious doubts as to the wisdom of this view.") Second, *Iskanian* relied on a Fifth Circuit decision and California district court opinions (now overruled) which proceeded the rulings of the Seventh and Ninth Circuits, and are thus based on dated authority. *Iskanian*, 59 Cal.4th at 373 ("This

conclusion is consistent with the judgment of all the federal circuit courts and most of the federal district courts that have considered the issue.") Indeed, since the Seventh Circuit issued its opinion in *Lewis*, circuit judges within the Fifth Circuit have suggested that the Court reconsider their position in light of the "well reasoned" logic set forth in *Lewis*. *SF Markets v. National Labor Relations Board*, No. 16-60186, 2016 WL 7468041, at *1 (5th Cir. July 26, 2016). Thus, the arbitrator should base its decision on the persuasive authority in *Morris* and *Lewis*.[1]

B. The Terms Of The Arbitration Agreement Explicitly Permit Concerted Activities Under The National Labor Relations Act.

As discussed in Section III(A)(1) above, the National Labor Relations Act ("NLRA") protects an employee's right to engage in concerted activities, which courts have repeatedly interpreted to include class or collective actions. Here, the arbitration agreement at issue explicitly states that employees "have not waived [] rights under the National Labor Relations Act to join other employees in a collective action to improve working conditions." Subramaniam Decl., Exh. A pg. 1. Accordingly, the plain language of the offered Arbitration Agreement permits Claimant's class allegations.

Also included in the arbitration agreement is a class action waiver which states "We also agree that any arbitration between the Company and me will be on an individual basis and not as a class or collective action." *Id.* It would be inconsistent to interpret the term "collective action" differently in one paragraph than another, when in the same agreement. Basic principles of contract interpretation require that terms be interpreted in a consistent manner. *Titan Corp. v. Aetna Cas. & Sur. Co.*, 22 Cal. App. 4th 457, 474 (1994) ("we should interpret contractual language in a manner which gives force and effect to every clause rather than to one which renders clauses nugatory.") The consistent interpretation of the agreement is that the parties waived the right to pursue class or collective actions for non-employment claims outside the scope of the NLRA which do not pertain to the improvement of wages and working conditions, but continued

[1] This position is consistent with the opinion of Labor Scholars from some of the nation's leading academic institutions. Recently, a number of Labor Scholars submitted an Amicus Brief to the D.C. Circuit on this issue. *Brief of Labor Scholars as Amicus Curiae in support of Respondent*, Price-Simms, Inc. v. National Labor Relations Board, No. 32-CA-138015 (D.C. Cir. June 3, 2016)

to preserve their rights to proceed with class or collective actions under the parameters of the NLRA. To hold otherwise would nullify the term "collective action" as it pertains to the Arbitration Agreement's NLRA carve out provision. To the extent there remains ambiguity as to meaning of the Arbitration Agreement, contract principles require that the agreement be interpreted against its drafter namely, Defendants. *Neal v. State Farm Ins. Companies*, 788 Cal. App. 2d 690, 695 (Ct. App. 1961) (finding that ""The rule that any ambiguities caused by the draftsman of the contract must be resolved against that party applies with peculiar force in the case of the contract of adhesion.")

Given that the parties explicitly preserve the right to pursue class and collective actions under the NLRA, the arbitration issue should proceed on a class-wide basis.

IV. CONCLUSION

Based on the foregoing reasons the arbitration should proceed on a class wide basis.

DATED: January 13, 2017

MATERN LAW GROUP, PC

By: _____

Matthew J. Matern, Esq.
Tagore O. Subramaniam, Esq.
Attorneys for Claimant

DECLARATION

DECLARATION OF ROBERT D. VOGEL

I, ROBERT D. VOGEL, declare and state as follows:

1. I am an attorney at law and the principal attorney representing the Respondents in this case. The following is based on my personal knowledge, except where otherwise indicated and, if called as a witness, I can and would testify competently thereto.

2. On or about January 11, 2018, I received an Order from the Regional Director of Region 31 postponing the hearing in this case indefinitely in light of the Board's recent decision rendered in *Boeing, Co.,* 365 NLRB No. 154 (2017). A true and complete copy of this Order is attached hereto as Exhibit "1".

3. On January 16, 2018, I received an e-mail from Nicholas Gordon ("Gordon"), the attorney handling this case for Region 31, affording me the opportunity to submit a supplemental position as to whether Respondents violated the Act by allegedly maintaining an "overly broad" 2011 Arbitration Agreement "which employees would reasonably conclude precludes from, or restricts them in, filing unfair labor practice charges with the Board." A true and complete copy of this e-mail is attached hereto as Exhibit "2".

4. On February 2, 2018, consistent with Gordon's January 16, 2018 e-mail to me, I responded to his e-mail in writing, a true and complete copy of which is attached hereto as Exhibit "3".

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5. Thereafter, Region 31 issued an Order reconvening the hearing scheduling it for May 30, 2018.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct.

Executed this 15th day of May, 2018 at Los Angeles, California.

ROBERT D. VOGEL

4827-2711-2294, v. 1

EXHIBIT 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31

APPLE SOCAL, LLC D/B/A APPLEBEE'S, APPLE AMERICAN GROUP II, LLC D/B/A APPLEBEE'S, AND APPLE AMERICAN GROUP, LLC

and **Case 31-CA-185387**

SAMUEL Y. RODRIGUEZ

ORDER POSTPONING HEARING INDEFINITELY

IT IS ORDERED that the hearing in the above matter set for February 27, 2018, is hereby postponed indefinitely to re-examine the case in light of the Board's recent decision in *Boeing*, 365 NLRB No. 154 (12/14/17).

Dated: January 11, 2018

MORI RUBIN
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 31
11500 W Olympic Blvd Ste 600
Los Angeles, CA 90064-1753

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31

APPLE SOCAL, LLC D/B/A APPLEBEE'S, APPLE AMERICAN GROUP II, LLC D/B/A APPLEBEE'S, AND APPLE AMERICAN GROUP, LLC

and **Case 31-CA-185387**

SAMUEL Y. RODRIGUEZ

AFFIDAVIT OF SERVICE OF: Order Postponing Hearing Indefinitely, dated January 11, 2018.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on January 11, 2018, I served the above-entitled document(s) by **regular mail** upon the following persons, addressed to them at the following addresses:

Melissa Griffin
Apple Mid Cal II, LLC d/b/a Applebee's
10709 E. Foothill Blvd
Rancho Cucamonga, CA 91730-3858

Natalja Fulton
APPLE AMERICAN GROUP LLC
225 Bush St Ste 1800
San Francisco, CA 94104-4211

ROBERT D. VOGEL , Attorney at Law
JACKSON LEWIS LLP
725 S Figueroa St Ste 2500
Los Angeles, CA 90017-5408

Apple Mid Cal II, LLC d/b/a Applebee's
377 N Citrus Ave
Azusa, CA 91702-3909

Apple American Group II, LLC d/b/a Applebee's
6200 Oak Tree Blvd., Suite 1800
Independence, OH 44131

Samuel Y. Rodriguez
c/o Matern Law Group
1230 Rosecrans Ave, Suite 200
Manhattan Beach, CA 90266-2497

TAGORE SUBRAMANIAM , ESQ.
Matern Law Group
1230 Rosecrans Ave, Suite 200
Manhattan Beach, CA 90266

Matthew J. Matern , Attorney at Law
Matern Law Group
1230 Rosecrans Ave, Suite 200
Manhattan Beach, CA 90266

Apple American Group, LLC
6200 Oak Tree Blvd., Suite 1800
Independence, OH 44131

January 11, 2018
Date

Jorge Romero, Designated Agent of NLRB
Name

/s/ Jorge Romero
Signature

EXHIBIT 2

Vogel, Robert D. (LA)

From: Gordon, Nicholas <Nicholas.Gordon@nlrb.gov>
Sent: Tuesday, January 16, 2018 10:12 AM
To: Vogel, Robert D. (LA)
Cc: Wyllie, Steven
Subject: FW: PROD: Your ALJ Postponement Request has been GRANTED: 31-CA-185387 in ,

Hello Mr. Vogel,

As you may have seen, the Region has issued an Order postponing the hearing in the Applebee's case. In light of the Board's recent decision in The Boeing Company, 365 NLRB No. 154, slip op. (2017) and Cayuga Medical Center at Ithaca, Inc., 365 NLRB No. 17, slip op. (2017) the Region would like to solicit the Employer's supplemental position on whether Applebee's has violated Section 8(a)(1) of the Act by maintaining an overly broad Dispute Resolution Program and Agreement which employees would reasonably conclude precludes from, or restricts them in, filing unfair labor practice charges with the Board. Please specifically address how the Board's departure from the Lutheran Heritage Village-Livonia, 343 NLRB 646(2004) standard should impact the Region's determination, and what, if any, new standard the Region should evaluate Applebee's Booklet and Agreement under. Please also include citations to any relevant Board decisions or other appropriate legal authority.

I am requesting to receive the Employer's position on this issue by Friday February 2, 2018.

Please let me know if you have any questions.

Best,

Nicholas Gordon
Field Attorney
United States Government
National Labor Relations Board, Region 31
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The NLRB requires all parties to file documents electronically through our online E-File system:
https://apps.nlrb.gov/eservice/efileterm.aspx

-----Original Message-----
From: nxgen@nlrb.gov [mailto:nxgen@nlrb.gov]
Sent: Thursday, January 11, 2018 2:34 PM
To: ML-31LAS-Efile <ML-31LAS-Efile@nlrb.gov>; Gordon, Nicholas <Nicholas.Gordon@nlrb.gov>
Subject: PROD: Your ALJ Postponement Request has been GRANTED: 31-CA-185387 in ,

The ALJ Postponement Request submitted by Region 31, Los Angeles, California in this case has been GRANTED. Here are the details:

Case Number: 31-CA-185387
Case Name: Apple SoCal, LLC d/b/a Applebee's, Apple American Group II, LLC d/b/a Applebee's, and Apple American Group, LLC
Location: ,
Requested Postponement Date:
Requested Postponement Time:

EXHIBIT 3

Representing Management Exclusively in Workplace Law and Related Litigation

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BALTIMORE, MD	INDIANAPOLIS, IN	OMAHA, NE	SAINT LOUIS, MO
BIRMINGHAM, AL	JACKSONVILLE, FL	ORANGE COUNTY, CA	SAN DIEGO, CA
BOSTON, MA	LAS VEGAS, NV	ORLANDO, FL	SAN FRANCISCO, CA
CHICAGO, IL	LONG ISLAND, NY	PHILADELPHIA, PA	SAN JUAN, PR
CINCINNATI, OH	LOS ANGELES, CA	PHOENIX, AZ	SEATTLE, WA
CLEVELAND, OH	MEMPHIS, TN	PITTSBURGH, PA	STAMFORD, CT
DALLAS, TX	MIAMI, FL	PORTLAND, OR	TAMPA, FL
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February 2, 2018

VIA EMAIL AND U.S. MAIL

Nicholas Gordon
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11500 W. Olympic Boulevard, 6th Floor
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Nicholas.Gordon@NLRB.gov

Re: Apple SoCal, LLC, et al. (Case 31-CA-185387)

Dear Mr. Gordon:

This letter is in response to the regional director's recent January 11, 2018 order postponing the hearing in the above matter indefinitely and your related January 16, 2018 email to me requesting respondents address the impact of the Board's recent decision rendered in *The Boeing Company*, 365 NLRB No. 154 (2017) (*Boeing*), a decision I earlier referenced as a specific affirmative defense in respondents' second amended answer to the complaint in this case.

Although I disagree with the self-serving statements in your July 16th email respondents' Dispute Resolution Program and related Agreement (collectively "Agreement") at issue in this case is "overly broad" and/or impacted individuals "would reasonably conclude precludes from, or restricts them in, filing unfair labor practice charges with the Board," respondents acknowledge the only issue that is presently being actively adjudicated by the region is set forth in paragraph 10 of the operative complaint: "at all material times," does the Agreement "preclude [employees] from, or restrict them in, filing unfair labor practice charges with the Board"?

Although respondents contend the pertinent language in the 2011 Agreement is explicit and unambiguous in stating that nothing contained therein precludes or restricts individuals from filing an unfair labor practice charge, the first charge in this case alleging a violation of the Act in this respect was the first amended charge filed on January 17, 2017, several years after respondents adopted, maintained and generally enforced thereafter a substantively new, different and modified Agreement which, apparently, Region 31 does not contend violates the Act in the same method and manner in which it asserts the previously maintained and enforced 2011 Agreement violates the Act.

Accordingly, the alleged violation currently being litigated in this case is barred by the limitations period in Section 10(b) of the Act. *See e.g., Adecco USA, Inc.*, 364 NLRB No. 9 at p. 9 n. 2

(2016) and *CVS RX Services, Inc.* and *CVS Pharmacy, Inc.*, 363 NLRB No. 180 at pp. 2 n. 3 and 13 (2016).

Nevertheless, for the same reasons the region and respondents previously agreed the other allegations and alleged violations of the Act set forth in the complaint be stayed because they will "be directly impacted" by the Supreme Court's soon to be decided decision in *National Labor Relations Board v. Murphy Oil, USA* and *Epic Systems v. Lewis* ("*Murphy Oil*"), respondents believe this separately alleged violation of the Act should be stayed as well pending the Supreme Court decision in *Murphy Oil* because in *Boeing*, in determining whether employment policies and/or handbook provisions ("rule") like the rule involved in this case violates the Act and constitutes an unfair labor practice, the Board declared the region should focus upon and evaluate, consistent with Category 1(ii), whether the rule's "potential adverse impact on protected rights is outweighed by [business] justifications associated with the rule" **and** Category 3 rules in determining whether "the adverse impact on NLRA rights [by maintaining and enforcing the rule] is not outweighed by justifications associated with the rule." *Boeing*, at 3–4.

Regardless of whether the employers prevail before the Supreme Court in *Murphy Oil*, the Supreme Court will no doubt opine on an employer's "justifications associated" with requiring applicants for employment and/or existing employees, like the charging party herein, to enter into written agreements with them in which individuals voluntarily and unambiguously agree to prospectively have their employment-related claims decided on an individual rather than a class or collective basis.

In agreeing to a class waiver, employees voluntarily waive their otherwise entitlement to participate in class proceedings and, thus, under Section 8 of the Act, their decision to do so cannot constitute "interfere[nce] with" a right that has been validly waived. 29 U.S.C §158(a)(1).

Section 7 of the Act supports the proposition the right to engage in concerted activities may be individually waived because it expressly affords each employee "the right to refrain from any or all such activities," 29 U.S.C. §157, and the Supreme Court declared in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009), "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." No dispute exists in this case, or in *Murphy Oil*, a union, in a collective bargaining agreement, can legally waive an employee's individual right to participate in class or collective actions and require instead the individual arbitration of each employee's claims because "[t]he class action waiver merely limits arbitration to the two contracting parties." *Am. Express Co. v. Ital. Colors Rest.*, 133 S.Ct. 2304, 2311 (2013). Thus, by voluntarily agreeing to the Agreement generally and class waivers contained therein specifically, the charging party herein validly waived whatever Section 7 rights to class proceedings he may have enjoyed prior thereto.

Although respondents submit Section 7 of the Act does not confer a right on the charging party to have any legal claims decided on a class or collective basis, Section 8 of the Act did not prohibit the respondents from entering into the Agreement with the charging party wherein he voluntarily and expressly waived that right. Respondents contend the Act did not bar them from entering into the Agreement with the charging party to prospectively limit his access to class proceedings through an

Lutheran Heritage's decision rules are unlawful if a reasonable employee inferred an employer's purpose in promulgating the rule was to restrict Section 7 activities is no longer the legal barometer by which respondents' rule at this issue in this case should be viewed and evaluated.

Conclusion

Respondents submit that in light of *Boeing*, the region should stay this component of the complaint until the Supreme Court renders its decision soon in *Murphy Oil* because the court, in its decision, will no doubt (1) explicitly address an employer's legitimate justification and interest associated with class action waiver rules, (2) whether NLRA protected activities impacted by the rule are "peripheral" or "central" to the purposes of the Act and (3) in determining the legality of a class action waiver rule, is "the risk of intruding on NLRA rights . . . 'comparative[ly] slight.'" *Id.* at 15.

Alternatively, the holding in *Boeing* directly impacts the region's current determination the rule herein "is overly broad . . . which employees would reasonably conclude precludes from or restricts them in, filing unfair labor practice charges with the Board" as you advocate in your January 16th email to me. That conclusion should be re-evaluated by the region in determining (1) whether the rule is ambiguous when "balancing rights and interests or justifications" associated with the rule and (2) evaluating and determining whether the rule is central or peripheral to NLRA protected activities because *Boeing* counsels "the Board must carefully evaluate the nature and extent of the rule's adverse impact on NLRA rights, [in] addition to potential justifications [for the rule] and [whether] the rule's maintenance will violate Section 8(a)(1) if the Board determines that the justifications are outweighed by the adverse impact on rights protected by Section 7." *Id.* at 16. *Boeing* advocates "the Board has the duty to strike the balance between employees' rights and employers' business justifications in determining the legality of employment policies, rules, and handbooks." *Id.* at 3 n. 14. Thus far, the region has failed to do that in this case.

The Board in *Boeing* directed the region in this case to balance "employees' Section 7 rights against legitimate employer interests rather than narrowly examining the language of a disputed rule solely for its potential to interfere with the exercise of Section 7 rights, as the *Lutheran Heritage* 'reasonably construe' test requires." *Id.* at 8. Because the region has failed to do that to date in this case, it should now do so in light of *Boeing*.

Respectively Submitted,

JACKSON LEWIS P.C.

Robert D. Vogel

Attorneys for Respondents

individual contract consistent with *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 17 (1962), which held Section 7 does not protect concerted activities that result in a breach of contract. Section 7 provided the charging party both the right to "engage" in concerted activities and the right to "refrain" from engaging in such activities. 29 U.S.C §157. Thus, by entering into the Agreement in this case that contained a class action waiver, the charging party voluntarily agreed on an expressly limited basis to refrain from his otherwise entitlement to participate in concerted activities and the NLRA does not prohibit his ability to do so in consideration for him being hired and/or other arguable benefits he received in consideration for his consent.

The Board in *Boeing* rejected the holding in *Lutheran Heritage Village–Livonia*, 343 NLRB 646 (2014), because it "leaves no room for the Board to draw important distinctions between different types of rules, different business justifications, and different Section 7 rights, and it disregards differences between and among rules with respect to their potential impact on protected rights." *Id.* at 10. To date in this case, the region has not considered respondents' "business justifications" for the class action waiver rule and/or its impact on the charging party's and similarly situated employees' Section 7 rights.

Boeing instructed regions, which Region 31 has not done to date in this case, to "evaluate two things: (i) the nature and extent of the potential impact on NLRA rights [by maintaining and enforcing the class action waiver rule], and (ii) [respondents'] legitimate justifications associated with the [rule's] requirement(s)." *Id.* at 14. "In all cases, the Board will consider whether a facially neutral rule, when reasonably interpreted, has a potential adverse effect on the exercise of NLRA-protected rights. **If so, the Board will then consider the justifications associated with the challenged rule to determine whether maintenance of the rule violates the Act."** [emphasis added] *Id.* at 20.

And even if the rule "may reasonably chill" the exercise of Section 7 rights, it may "still be justified by significant employer interests." *Id.* at 7 n. 30 where the Board in *Boeing* emphasized Member Hurtgen's statement to this effect in *Lafayette Park Hotel*, 326 NLRB at 825 fn. 5.

In this case, respondents submit the region has not "reasonably interpreted" the class action waiver rule consistent with the ambiguity test enunciated in *Boeing* nor has it considered respondents' business justifications and reasons for the rule to determine whether the maintenance and enforcement of the rule violates the Act.

The obvious business "justification" associated with the class action waiver agreement is that it is more efficient, expeditious and less expensive for respondents and their employees to resolve any employment-related disputes between them on only a bilateral basis in arbitration.

In deciding *Murphy Oil*, respondents believe the Supreme Court will address and opine upon an employer's "justification" for maintaining and enforcing individual contracts entered into with their prospective and existing employees in which the individuals expressly waive certain joint legal activities such as their ability to assert employment disputes and claims in a class action.

As a result, because respondents' "justification" for their class action waiver rule is now a mandatory component that must be considered and evaluated in determining whether the maintenance and enforcement of the rule violates the Act as a Category 1(ii) and/or 3 rule, this component of the complaint should be stayed as well pending the Supreme Court's upcoming decision in *Murphy Oil.*

Furthermore, for reasons never communicated to respondents, it is the region's position the Agreement, a facially neutral rule, violates the "reasonably construe" standard previously adopted by the Board in *Lutheran Heritage* that was overruled by the Board in *Boeing*.

As you are aware, the fourth paragraph on page 1 of the Agreement states **"I also understand that I have not waived my rights under the National Labor Relations Act to join other employees in a collective action to improve working conditions. Further, I will not be subject to adverse employment action if I challenge the validity of this arbitration agreement or it provisions."**

Significantly, the region does not contend the charging party was threatened with or subject to an adverse employment action by challenging the validity or enforceability of the Agreement he agreed to in writing when he was hired as an explicit term and condition of his employment. *See Boeing* at 4 n. 15.

Respondents submit the above-quoted language in the Agreement clearly, explicitly and unambiguously apprised the charging party he was not precluded or restricted from filing an unfair labor practice asserting the class action waiver contained in the Agreement and/or any other policy or rule violated the Act. And no competent evidence exists the charging party "reasonably construed" the rule "to prohibit some type of potential Section 7 activity that might (or might not) occur in the future." *Id.* at 2.

In *Boeing*, the Board rejected *Lutheran Heritage* because, like what the region has done to date in this case, the Board found the rules to be unlawful "**solely** because they were ambiguous in some respect without taking into account any legitimate justifications associated with policies, rules and handbook provisions." *Id.* [Board's emphasis]

Although the Board's majority in *Boeing* differed as to whether "the reasonable interpretation of the rule is conducted from the perspective of a reasonable employee," *Id.* at n. 14 and 16, it declared a Category 1(i) rule is lawful if **"when reasonably interpreted,** [it] does not prohibit or interfere with the exercise of NLRA rights . . ." [emphasis added] *Id.* at 3 and 15. The "reasonable interpretation" component in a Category 1(i) rule is also implicit in a Category 3 rule assumed to be unlawful if the rule "would prohibit or limit NLRA – protected conduct." *Id.* at 4.

Consistent with *Boeing*, respondents submit the region should re-evaluate its factually unsubstantiated conclusion the above-quoted language in the Agreement is ambiguous in precluding or restricting the charging party and similarly situated employees from filing unfair labor practice charges because since *Lutheran Heritage*, the Board "has consistently misapplied an evidentiary principle that ambiguity in general work rules language must be construed against the drafter." *Id.* at 10 n. 43. The Board noted in *Boeing* "a rule is ambiguous if it **could** be read to prohibit Sec. 7 activity, among other possible interpretations, regardless whether employees reasonably **would** read it that way." [emphasis added] *Id.*

In light of *Boeing*, respondents respectfully submit the region should re-evaluate its conclusion the rule at issue in this case is ambiguous because it cannot be reasonably interpreted to prohibit Section 7 activities regardless of whether the charging party and other individuals read and interpreted it that way.

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2018, I caused the foregoing ***RESPONDENTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT; SUPPLEMENTAL DECLARATION OF NATALJA FULTON; DECLARATION OF ROBERT D. VOGEL; AND EXHIBITS IN SUPPORT THEREOF*** on the parties listed below:

SERVED VIA E-FILING

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4849-5926-8454, v. 1